No.....

United States Circuit Court of Appeals

For the Ninth Circuit.

B. STORY and L. P. WORK, Co-partners doing business under the firm name and style of STORY AND WORK,

Plaintiffs in Error,

vs.

R. N. STANFIELD,

Defendant in Error.

BRIEF OF PLAINTIFFS IN ERROR

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BRIEF OF PLAINTIFFS IN ERROR

Statement

The amended complaint in this case sets forth that Story & Work (the plaintiffs below and the plaintiffs in error here) were partners engaged in the livestock business and residing at Bozeman, Montana; that William Rea, Jr., was a livestock broker engaged in the business of buying and selling sheep on comission, known to be such to the plaintiffs and defendant, and that prior to May, 1917, in several transactions that took place covering a period of years, he purchased from and sold to the defendant Stanfield, who resided at

Stanfield, Oregon, several thousand head of sheep; that on the 28th day of April, 1917, the defendant Stanfield entered into a contract with the plaintiffs, through Rea as broker, for the sale of seven thousand head of yearling ewes belonging to the plaintiffs, delivery of which was to be made at White Sulphur Springs, Montana, and Three Forks, Montana, on July first, and on which a part payment of four thousand dollars ($4,000.00) was made. The contract thus entered into is as follows:

"REA BROTHERS
Live Stock Dealers
Billings, Mont.

THIS IS TO CERTIFY, That Story & Work of Bozeman, Mont., have this 28th day of April, 1917, bargained and sold to R. N. Stanfield, Stanfield, Oregon, or order, the following described Live Stock, and do hereby guarantee the title thereto, viz:

No. head	Description	Brands	Price per Head	Time and Place of Delivery F. O. B. Cars.
About	7000 Head of yearling ewes		$10.00	White Sulphur Springs and Three Forks, Mont. July 1st, 1917

Any sick or cripple out not taken.
3600 Head now running near Logan balance near White Sulphur Springs.

.....to weigh.....pounds average or more.

Stock guaranteed to be in merchantable condition at time of delivery, and bought subject to Federal or State inspection.

Received in part payment for above mentioned, stock, $4,000.00.

(Signed) STORY & WORK,
Per (L. P. W.)
R. N. STANFIELD,
by Wm. Rea, Jr.

(Witness).....”

That thereafter, on the 25th day of May, 1917, the plaintiffs, desiring to repurchase from the defendant the ewes so sold, and desiring to purchase the defendant's rights in the contract above set forth, through Rea acting as broker, sent to the defendant at Stanfield from Billings the following telegram, to-wit:

“May 25th, 1917.

R. N. Stanfield,
Stanfield, Oregon.

Wire lowest price you will sell the Seven Thousand Story and Work yearling ewes.

(Signed) WM. REA, Jr.”

and meaning thereby, as the defendant knew, the ewes that were purchased from them; that in reply to this telegram, the defendant Stanfield, on the afternoon of the 26th, sent to Rea at Billings from Portland, Oregon, the following telegram:

“Portland, Ore., May 26th, 1917.

Wm. Rea,
Billings, Mont.

Lowest price on Story and Work yearling ewes Eleven fifty this subject to immediate acceptance.

(Signed) R. N. STANFIELD."

That this telegram was received on the afternoon of the 26th, that Rea had left Billings for Butte, and that the telegram was forwarded to him there, where it was received by him about eight o'clock in the evening of that day; and that immediately upon its receipt, he accepted for himself, and on behalf of the plaintiffs, the offer so made by then and there forwarding the following telegram:

"Butte, May 26, 1917.

R. N. Stanfield,
Stanfield, Oregon.

Sold your Story Work seven thousand yearling ewes eleven fifty. Mail you contract and check for seven thousand dollars tomorrow.

(Signed) WM. REA, Jr."

It is averred that this telegram was received by the defendant on the 26th. It is, likewise, averred that there was a well known custom that "immediate acceptance" in the offer that was made meant an acceptance within twenty-four hours, and that pursuant to this custom, the acceptance as declared by the telegram referred to was an immediate acceptance; that there was, likewise, a custom that where delivery was to be made in the

future, there should be paid of the purchase price (in the absence of an express agreement otherwise) a sum not to exceed eight per cent, payable in money or negotiable instruments, and that there was a custom, likewise, that in such transactions as the one under consideration where the services of a broker were utilized, the transaction could be carried on in the name of the broker without disclosing the principal's name; that pursuant to this custom and agreeable to the terms of the contract of sale, Rea, for and in behalf of the plaintiffs, sent by mail postage prepaid, on May 27th, a letter addressed to the defendant at Stanfield, Oregon, enclosing a check for $7,000.00, and also sending a memorandum of the contract of sale. The letter and contract are as follows:

"HOTEL PLACER

Maurice S. Weiss,
Manager.

Helena, Montana, May 27, 1917.

Mr. R. N. Stanfield,
Stanfield, Oregon.

Dear Senator:—

As per wires exchanged I am enclosing you contract on the 7,000 Story & Work yearling ewes also check for $7,000, advanced payment I will deliver the ewes myself and when I do will send you a draft for balance due you. Kindly sign contract where I have marked X. Keep one copy and return the other to me at Billings, Mont.

Hoping you are getting along fine and dandy, I remain

Yours truly,
W. R., Jr."

"REA BROTHERS Clear Range
Live Stock Dealers Booked: Sheep Bought
Billings, Mont.

THIS IS TO CERTIFY, That R. N. Stanfield of Stanfield, Oregon, have this 26th day of May, 1917, bargained and sold to Wm. Rea, Jr. Agt. Billings, Mont. or order, the following described Live Stock, and do hereby guarantee the title thereto, viz:

No. head	Description	Brands	Price Per Cwt. Head	Time and Place of Delivery F. O. B. Cars.
About	7,000 Yearling Ewes being same ewes bought from Story & Work of Bozeman, Mont.		$11.50	White Sulphur Springs and Three Forks, Mont. July 1st, 1917.

.....to weigh.....pounds average or more.

Stock guaranteed to be in merchantable condition at time of delivery, and bought subject to Federal or State inspection. All sheep to be dry fleeces, and lambs separated from their mothers, and weighed twelve hours off feed and water at.....

Received in part payment for above mentioned stock $7,000.

(Signed) X.....

.....

Wm. Rea, Jr. Agt.

(WITNESS).....

3600—3 Forks 3400 W. S. Spgs." [Tr. p. 13.]

It is alleged that this letter and its contents was received in due course of mail, and, although thus received, Rea was not advised regarding it until the 12th day of June, when he received a letter from the defendant returning the check. This letter is as follows:

"Stanfield, Oregon.
June 12th, 1917.

Wm. Rea, Jr.,
Billings, Mont.

Dear Sir:—

Referring to your letter and telegrams concerning the Story & Work yearling ewes, you will note that I quoted you a price for immediate acceptance, and as I did not receive a reply I concluded that you did not want them. The price on yearlings was steadily advancing and I was unable to hold them for you at the price quoted.

I am returning herewith your check for $7,000.00 as I am unable to sell these ewes at the price offered in your contract.

Yours truly,
R. N. STANFIELD,
DP by Don Pruitt."

The allegation is then made that the customs

and usages referred to heretofore were known to both parties, and that the dealings that were carried on, as evidenced by the telegrams and letters, were carried on agreeably to them, and that these customs were generally and universally observed in the case of the sale of sheep. A breach of the contract is then alleged with resulting damages amounting to $21,000.00. [Amended Complaint, Tr. pp. 6-15.] To this amended complaint a general demurrer was interposed [Tr. p. 16], and sustained [Tr. pp. 17-19], and a judgment of dismissal of the action was ordered and entered. [Tr. p. 20.]

SPECIFICATION OF ERRORS

I.

The Court erred in sustaining the demurrer to the amended complaint.

II.

The Court erred in ordering and entering judgment for the defendant.

ARGUMENT

We quote as follows from the decision of the learned Judge who ruled on the demurrer:

> "It is elementary law that to constitute a contract there must be a meeting of the minds of the parties not only as to the subject-matter but also as to the extent and character of the obligations assumed by each, and if the

alleged contract consists of an offer by one party by mail or by telegraph, there must be an unconditional acceptance thereof by the other in accordance with the terms of the offer, and if any conditions are attached to the acceptance or it goes beyond the offer, no contract obligation arises."

To the principles declared in the excerpt presented, we unqualifiedly assent, and in the instant case, unless we can fairly and fully meet its requirements, we feel that an affirmance of the judgment should be ordered. So that no misundertanding may exist as to our position in this controversy, we desire at the outset to assert that the consideration of the telegrams by themselves alone cannot be sanctioned. With the telegrams, the contract for the sale of the sheep to Stanfield must be considered, and without this being done, important elements that enter into the contract are eliminated. The contract of April 28th, evidencing the sale of the ewes by the plaintiffs to the defendant, through Rea, is as essential to be considered as are the telegrams which relate to the offer that was made and the acceptance of it. Without recourse to that contract, the telegrams themselves would fall far short of making a contract.

What was the situation when the first of these telegrams was forwarded to the defendant by Rea? Rea was a broker engaged in the business of buying and selling sheep. On the 28th of April,

less than a month before the sending of the first telegram, Story & Work sold these ewes to the defendant, Mr. Rea representing the defendant in the transaction. The contract evidencing this sale appears in the transcript pages 12 and 13. This contract expressly sets forth the sale of these ewes, guarantees the title, names the number as about 7,000 head, fixes the price at $10.00, specifies the time and place of delivery, and specifies, likewise, that about 3600 of the number were ranging near Logan, and the balance near White Sulphur Springs. The time of delivery was designated as the first of July, and the places of delivery were designated as White Sulphur Springs and Three Forks. This contract also contained an acknowledgment of payment of $4,000.00 as part payment of these ewes. This contract is signed

"Story & Work
per (L. P. W.)"
"R. N. Stanfield,
by Wm. Rea, Jr."

The title of the defendant to these ewes rests upon this contract. The other side will not contend that this is not an enforcible contract. As already stated, in less than a month after this contract was entered into, Rea, as a broker and acting for the plaintiffs, sent the first of the telegrams heretofore set forth to Stanfield, at Stanfield, Oregon, wanting him to wire the lowest price he would

sell the Story & Work yearling ewes for. When this telegram was sent, Stanfield knew what ewes were referred to. He knew, before the first of July. He knew that the amount that he would receive for these ewes could not be determined definitely until the first of July. He knew that when this count was made on the first of July, no animals that were sick or crippled could be counted. His profit on the deal meant to him $1.50 per head. In the accounting that was to take place on the first of July, he would be charged on a basis of $10.00 a head, and receive credit on a basis of $11.50 a head on the two bands, aggregating about 7,000 head, less such number as should turn out to be sick or crippled. The defendant Stanfield, replying to this telegram the next day, telegraphed Rea:

> "Lowest price on Story & Work yearling ewes eleven fifty. This subject to immediate acceptance."

This telegram was sent from Portland, Oregon, and was received at Billings sometime in the afternoon of that day, and on the evening of that day from Butte, a reply telegram was sent as follows:

> "Sold your Story Work seven thousand yearling ewes eleven fifty. Mail you contract and check for seven thousand dollars tomorrow."

Some point is made on the fact that this reply telegram was sent to Stanfield rather than to Portland, from which place the telegram making the

offer was forwarded. This is a matter of no consequence in the controversy. The averment is made in the pleading that the telegram was received by the defendant on the 26th, and the only question that can arise then is, was the notification such as to comply with the requirements of the offer that the acceptance should be immediate? And this feature we will discuss at another time and place.

It is too obvious to need elaboration that the contract of April 28th entered into the negotiations and telegraphic correspondence that took place between Rea and Stanfield, and it is equally obvious that the provisions of that contract, whatever they were, became a part of the new contract that was entered into in so far as they were applicable. The plaintiffs knew, for instance, that the delivery of the ewes could not be made until July 1st. The defendant knew that he would not be compelled to make delivery before that time. Really, while the correspondence expressly provides for the sale of the ewes, the transaction in its true light meant that the rights in the contract then existing were transferred, the obligations of that contract to be determined definitely on the first of July. We insist then at the outset that the trial court should not only have considered the telegrams that passed between the parties, but should likewise have considered the contract that was entered into between them on the 28th of April.

Section 5031, Revised Codes of Montana.
Lyon v. Dailey Copper Co., et al., 46 Mont. 108, 126 Pac. 931.

As the contract under consideration was to be performed in the State of Montana, some of the Code provisions of that state have some bearing on the question we are now considering. We call attention particularly to the following sections of the Revised Codes of Montana, of 1907:

Section 5035 provides:

> "A contract is to be interpreted according to the law and usage of the place where it is to be performed; * * * ".

Section 5036 provides:

> "A contract may be explained by reference to the circumstances under which it was made and the matter to which it relates."

Section 5032 provides:

> "A contract must receive such interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done, without violating the intention of the parties."

What elements, may we inquire, are wanting to constitute a contract in the instant case? The subject-matter is not indefinite, the ewes are referred to as the Story & Work yearling ewes. There is no principle of law so well established as that which declares that a thing is certain which can be made certain. The defendant Stanfield certainly was not at sea as to what ewes were involved. As-

already stated, there was no uncertainty as to when delivery was to be made of the ewes and where. We submit that the only element in the contract that remained unsettled by the telegrams was the amount that should be paid in part payment before the first of July. The contract being silent on the matter and no custom prevailing in reference thereto, the time of payment would be when delivery of the ewes was made.

Section 5046, Revised Codes of Montana.

Gilfallan v. Gilfallan, 168 Cal. 23, 141 Pac. 623.

We quote as follows from the latter case:

> "Where one buys personal property at an agreed price, he, by implication of law, agrees to pay the price, and, if no time of payment is agreed upon, the law fixes the time of the delivery as the time of payment. * * * And if the time of delivery is postponed until the occurrence of some act to be done by the seller, the time of payment, if not otherwise provided for, will be postponed, by implication of law, to the time of such delivery. * * * This rule obviously applies to cases where the time of payment of part of the price is specifically fixed and the time of the payment of the remainder is left unprovided for."
>
> Gilfallan case, supra, page 625.

In the absence of an express agreement other-

wise providing, the ewes would be delivered within a resonable time. Here, however, as the delivery was not to be made within that time, a custom prevailed that when the contract was entered into, part payment of the purchase price should be made. The averment is made in the complaint that this custom existed, and that part payment was made, pursuant to the requirement of that custom. It will be noticed that when the purchase was made by the defendant from the plaintiffs, part payment was made of the agreed purchase price. The custom referred to required that a certain percentage of the purchase price should be paid, and the complaint avers that this was done. When the defendant returned the check, the only reason assigned by him why he didn't consider that a contract had been entered into was that the offer made called for an immediate acceptance, and this requirement was not observed. Let us see how lacking in merit this contention is. The telegram containing the offer was received sometime in the afternoon of the 26th, and on that day, the reply was wired from Butte, and it is alleged that the reply was received by the defendant on that date. The cases unanimously hold that the delivery of the telegram to the telegraph company fixed the time when the contract was closed.

Ruling Case Law, Vol. 6, page 615;
Burton v. United States, 202 U. S. 344, 50 L. Ed. 1057;

Wester et al. v. Casein Co. of America, 206 N. Y. 506, 100 N. E. 488;
Long v. Needham, 37 Mont. 418, 96 Pac. 731.

In the Wester-Casein case, *supra,* the Supreme Court of New York declares the rule in the following language:

> "We are of the opinion as we have stated that the delivery of the cablegram to the telegraph company should be treated as a delivery to the plaintiffs. It is deemed to be a delivery to the plaintiffs, whether received by them or not, for the same reason that when one person, by letter or telegram, makes an offer to another, and the other person accepts such offer, either by post or telegraph, the contract springs into existence at the time of such mailing or sending, because of implied authority in the carier of the message to receive the reply."

See, likewise:

Garretson v. North Atchison Bank, 47 Fed. 867, affirmed in 51 Fed. 168;
Andrews v. Schreiber, 93 Fed. 367, affirmed in 101 Fed. 763.

And as to the promptitude with which the telegram of acceptance was delivered to the company, we quote as follows from the decisions:

> "Again, it is said the machine was not returned at once when found not to work well. * * * The requirement that the binder be re-

turned 'at once' when found not to work well was complied with if returned to the place where received as soon as this, under the circumstances, could reasonably have been done. In Reg. v. Rogers, 3 Q. B. Div. 33, an agent is said to have remitted to his principal 'at once' if done within a reasonable time. 'At once' as used in such a contract, is synonymous with 'immediately,' 'forthwith', and 'as soon as possible,' which was usually construed to mean within such reasonable time as shall be required, under all the circumstances, for doing the particular thing. * * * In view of the distance the defendants lived from Cedar Rapids, and the surrounding circumstances, it was for the jury to say whether the machine was returned as soon as required by the terms of the warranty."

Warder, Bushnell etc. Co. v. Horne, 110 Iowa 285, 81 N. W. 591.

We submit on this proposition (if it assumes importance in the case—and the defendant concedes that it is the only proposition in the case, as shown by his letter) that the question as to whether the acceptance of the offer was immediate, in the light of the facts, was for the jury, and not for the court.

In the case of

Lucas v. Western Union Tel. Co., 131 Iowa 669, 109 N. W. 191, 6 L. R. A. (New Series) 1016,

the Supreme Court of Iowa, considering this matter, spoke as follows:

> "The plaintiff, then, did not accept the offer of Sas until the telegram was received by the latter, a few minutes after 6 o'clock p. m. of the day after the letter had been received and the question arises whether this was 'at once' within the meaning of the offer which stated that another deal was pending. Like 'forthwith' and 'immediately,' 'at once' does not mean instantaneously but requires action to be taken within a reasonable time. In view of the particular circumstances of the case, or, as said in Warder, Bushnell & Glessner Co. v. Horne, 110 Iowa 285, 81 N. W. 591, it is synonymous with the words mentioned and 'as soon as possible', and is 'usually construed to mean within such reasonable time as shall be required under all the circumstances for doing the particular thing.' It is doubtful whether the same vigilance should be exacted in the acceptance of an offer to exchange or purchase real estate as in transactions relating to the transfer of chattel property. See Kempner v. Cohn, 47 Ark. 519, 1 S. W. 869, 58 Am. Rep. 775. The circumstances of each case necessarily have an important bearing. There was no evidence of the time a letter, if promptly mailed, might have reached

> Sas. He had indicated in his letter that he was contemplating another deal, and we think ordinary minds fairly differ as to whether, in these circumstances, an acceptance 23 or 24 hours after the letter had been received was in time to bind the party making the offer, and the issue was for the jury to determine."

In this connection, the fact must not be overlooked that the averment of the pleading is that the term "immediately" in the instant case, agreeable to custom and usage, meant an acceptance within twenty-four hours. This allegation stands uncontradicted, and, in the consideration of the demurrer, the court was required to accept this averment without qualification. If the case then is to stand on the proposition that there wasn't an immediate acceptance of the offer, we respectfully submit that the defendant's contention in this regard is entirely devoid of merit.

Mailing Contract

It is claimed that the averment in the telegram of acceptance that a contract accompanying a check should be mailed was an intention that no binding contract should exist until the contract so mailed was executed. This does not at all necessarily follow. It is true that where it appears that the contracting parties do not intend to be bound by a contract (even though the terms are

agreed on) until a formal contract is signed, until that signing occurs no binding contract exists.

Ambler v. Whipple et al., 20 Wall. 546, 22 L. Ed. 403.

It is equally true that where the terms of a contract are agreed on, the mere fact that the parties had in contemplation reducing that contract to writing would, in no manner, affect the binding force of the contract agreed on.

Jenkins & Reynolds Co. v. Alpena Portland Cement Co., 147 Fed. 641.

In the case of

Mississippi & Dominion Steamship Co. v. Swift, 86 Maine 248, 41 Am. St. Rep. 545,

a rather exhaustive review of the cases is indulged in, and the conclusion of the court announced as follows:

> "From these expressions of courts and jurists it is quite clear that after all the question is mainly one of intention. If the party sought to be charged intended to close a contract prior to the formal signing of a written draft, or if he signified such an intention to the other party, he will be bound by the contract actually made, though the signing of the written draft be omitted. If, on the other hand, such party neither had nor signified such an intention to close the contract until it was fully expressed in a written instrument and attest-

ed by signatures, then he will not be bound until the signatures are affixed. The expression of the idea may be attempted in other words: if the written draft is viewed by the parties merely as a convenient memorial, or record of their previous contract, its absence does not affect the binding force of the contract; if, however, it is viewed as the consummation of the negotiation, there is no contract until the written draft is finally signed.

In determining which view is entertained in any particular case several circumstances may be helpful, as: whether the contract is of that class which are usually found to be in writing; whether it is of such nature as to need a formal writing for its full expression; whether it has few or many details; whether the amount involved is large or small; whether it is a common or unusual contract; whether the negotiations themselves indicate that a written draft is contemplated as a final conclusion of the negotiations. If a written draft is proposed, suggested, or referred to, during the negotiations, it is some evidence that the parties intended it to be the final closing of the contract."

In the instant case, the telegrams and the sale contract of the ewes to the defendant left nothing for future determination. The instruments them-

selves combined constituted a written contract. What was omitted in the telegrams was included in the sale contract. There was nothing to indicate that the contract that was to be forwarded by Rea was to contain any new provisions or conditions. The offer made by the defendant's telegram demanding immediate acceptance precludes the possibility of the contention that the closing of the deal should be postponed until a formal contract was executed. No doubt, the formal contract was intended simply to subserve the purpose of having in one instrument the terms of the agreement. Indeed, the sending of the $7,000.00 shows conclusively that the sending of the telegram accepting the offer left nothing for future consideration. We submit, then, that the sending of the contract, as stated in the telegram, does not, in any manner affect the contract wihch the sending of the telegram of acceptance closed.

The decisions are overwhelmingly with us in the contention we are now urging.

We cite for reference purposes, the following cases:

Sanders et al., v. Pottlitzer Bros. Fruit Co., 144 N. Y. 209, 29 L. R. A. 431, and note;

Post v. Davis, 7 Kan. App. 217, 52 Pac. 903;

Rankin et al., v. Mitchem, 141 N. C. 277, 53 S. E. 854;

Brewer v. Horst-Lachmund Co., 127 Cal. 643, 60 Pac. 418, 50 L. R. A. 240;

Nash v. Kreling, 123 Cal. XVIII, 56 Pac. 260;

Mercer Electric Mfg. Co. v. Connecticut Electric Mfg. Co., 87 Conn. 691, 89 Atl. 909;

United States v. J. P. Carlin Cont. Co., et al., (C. C. A, N. Y.), 224 Fed. 859;

Skeen v. Ellis et al., 105 Ark. 513, 152 S. W. 153;

Elks v. North State Life Ins. Co., 159 N. C. 619, 75 S. E. 808;

Grainger & Co. v. Louisville etc. Co., (Ky.), 116 S. W. 753;

Billings v. Wilby, 175 N. C. 571, 96 S. E. 50.

In the last case cited, the telegram of acceptance read as follows:

"Night letter received will accept send contract signed at once."

The court said:

"On perusal of this evidence, we are clearly of opinion that a definite contract to let the work in question was constituted between these parties by the telegram of plaintiff, dated January 14th, in reply to defendant's night letter and in terms, 'Night letter received will accept send contract signed at once,' and this result is not affected by the closing words of the message, 'Send contract signed,' etc.—this by correct interpretation meaning merely that it was the desire and preference of the plaintiff that the agreement they had made should be written out and formally signed by the parties, and it is the rec-

ognized position here and elsewhere that, when the parties have entered into a valid and binding agreement, the contract will not be avoided because of their intent and purpose to have the same more formally drawn up and executed, and which purpose was not carried out."

In leaving this branch of the subject, we might incidentally remark that the defendant Stanfield did not request that a formal contract should be executed, and Rea's mention of it does not make its execution indispensable to a completed contract. As already stated, a formal contract, entire in itself, as evidence of the contract entered into resting upon the telegrams and contract evidencing a sale of the ewes to the defendant, would be desirable. The original telegrams signed by the parties weren't in their possession. The amount involved brought the transaction within the purview of the statute of frauds, and for this reason, if for no other, a contract evidenced by a single instrument was something that both parties would necessarily wish to possess.

Acceptance of Offer

It is contended that the words "Sold your Story & Work seven thousand yearling ewes" in the telegram, which we are designating as the telegram of acceptance, was not an acceptance at all. We submit that such refinement does not commend itself either for its reason or logic. Suppose that

Rea said, "Offer accepted. Sold your Story & Work seven thousand yearling ewes." Could any question be raised as to the meaning or sufficiency of such language? Are not the words used just as effective? Rea could not have sold the ewes without accepting the Stanfield offer, and he would not have transmitted the $7,000.00 by mail if he did not think he had done so.

Section 5082, *supra,* provides that a contract must receive such interpretation as will make it operative, definite and capable of being carried into effect. Stanfield did not complain about his offer not being accepted. The only objection that he urged was that the offer wasn't accepted with sufficient promptitude.

Agency of Rea

Assuming now that the telegraphic correspondence constituted a contract, we insist that it matters little whether Rea was merely acting as agent for an undisclosed principal or whether he was acting for himself. In this instance, Stanfield could hold Rea or the principal at his election.

Vol. 2, Corpus Juris, Sections 505 and 526;
Cyc. Vol. 31, page 1564.

As a general rule, an undisclosed principal may enforce contracts made by an agent in his own name.

Vol. 2 Corpus Juris, Sections 555 and 557;
Cyc. Vol. 31, page 1555.

The rule, that may be stated to be of universal

application, is that in the case of making a contract where an agent contracts in his own name, and the contract is ostensibly made with the agent as principal, the principal may sue on such contract, subject, of course, to such defenses as the other party may have against the agent with whom the contract is made.

Section 5448, Revised Codes of Montana.

And so, likewise, the other contracting party may have recourse against the agent with whom the contract is made, or may have recourse against the undisclosed principal when the fact that there is an undisclosed principal is revealed.

See

Vol. 2 Corpus Juris, Agency, Sections 505, 526, 555 and 557, *supra,* and cases there cited.

Cyc. Vol. 31, pages 1555 and 1564, *supra,* and cases there cited.

Uncertainty as to Amount of Part Payment

In the telegrams that passed between the parties, nothing is said as to the time of payment. In the absence of any express agreement and any custom relating to the matter regarding the time of payment, payment would be made when transfer of the ewes was effected on July first. It is alleged, however, that there prevailed the custom, general in its nature, that when a contract was entered into, as in this case, part payment of the purchase price should be made, and that this custom

provided what the proportion should be. The amended complaint contains the averment that this part payment was made conformably to this custom.

It is needless to cite cases showing that custom and usage enter into contracts and become a part of them. The rule is succinctly stated in Corpus Juris, as follows:

> "Valid usages concerning the subject-matter of a contract, of which the parties are chargeable with knowledge, are by implication incorporated therin, unless expressly or impliedly excluded by its terms, and are admissible to aid in its interpretation, not as tending in any respect or manner to contradict, add to, take from, or vary the contract, but upon the theory that the usage forms a part of the contract."
>
> Vol. 17 Corpus Juris, pages 492, 493 and 494.

Again, the same authority in regard to terms and prices announces the rule as follows:

> "In like manner and for like reason evidence of usage on the question as to quantity, terms and price is admissible."
>
> Vol. 17 Corpus Juris, page 503.
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> Brent v. Charles H. Lilly Co., 202 Fed. 336;
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> Barrie v. Quimby, 206 Mass. 259, 92 N. E. 451;
>
> Hayes v. Union Mercantile Co., 27 Mont. 264, 70 Pac. 975.

Luckenbach S.S.Co. v. W. R. Grace & Co. 267 Fed. 677.

Upon the argument on the demurrer, it was suggested that the pleading is defective in not setting forth the custom and usage relied on. If such a defect existed, it would not be reached by a general demurrer, and in the instant case, we are dealing with a general demurrer. We respectfully insist, however, that the pleading is not vulnerable in the particulars stated. The averment of the pleading relating to this matter is as follows:

> "Plaintiffs further aver that the customs and usages hereinbefore mentioned were known to plaintiffs and defendant and to the said Rea, and said dealings as evidenced by said telegrams and letters and as conducted by the said Rea for and in behalf of the plaintiffs, were carried on agreeably to said usages and customs, and that the same were generally and uniformly observed in the case of sales of livestock and particularly of sheep."

It would be time spent profitlessly to discuss whether general usages should be pleaded. The rule seems to be well founded that this is not necessary.

12 Cyc, 1097.
17 Corpus Juris, page 516.

So, likewise, where a local custom is incidental to an implied contract and relied on as evidence of some fact in issue, it is not necessary to plead same.

Sherwood v. Home Savings Bank, 131 Iowa 528, 109 N. W. 9.

Where, however, a local custom is relied on, as entering into a contract and forming part of same, it must be pleaded.

Harrison v. Birrell, 58 Ore. 410, 115 Pac. 141.

In the instant case, the usages relied on are pleaded, and the sufficiency of such pleading is determined by requirements which are specifically set forth in the following excerpt from Corpus Juris:

> Where it becomes necessary to plead a custom or usage, all the essentials requisite to its validity and binding effect must be averred. Hence the pleading should either aver knowledge on the part of the person to be charged or allege facts authorizing the conclusion that it was of such general notoriety that he will be presumed to have knowledge."

Vol. 17 Corpus Juris, page 518.

Tested by this standard, we submit that the averments of the pleading adequately meet the test. We say that the customs and usages set forth were known to the plaintiffs, defendant and Rea; that they were generally and universally observed in transactions of the kind under consideration.

While no principle of estoppel may be successfully invoked, the defendant in this case is placed in a not too favorable light by the correspondence

carried on. Advised on the 26th that the offer made by him was accepted, and having in his possession the contract and check probably not later than the 28th of May, he preserved for the period of two weeks an ominous silence, If the market went up, he would return the letter and check, which he did. If it went down, he would keep the check, and consider the contract a binding one. The court should not look too favorably on the many technical grounds which are now urged, in the light of the fact that the only objection that the defendant urged himself was that the notification of the acceptance of the offer was not prompt enough. In the light of the authorities which have been submitted, we insist that this ground is untenable, and insist, likewise, that should there be any question as to whether the notification of acceptance of the offer was sufficiently prompt, it presented a question of fact for submission to the jury rather than a question of law to be disposed of summarily by the court.

The learned trial court was in error in sustaining the demurrer to the complaint, and the judgment entered accordingly, we respectfully submit, should be reversed.

Respectfully submitted,
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